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No. 92-97

Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC., *et al.*,  
*Petitioners,*  
v.

COUNTY OF KENT, MICHIGAN, *et al.*,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Sixth Circuit

**BRIEF OF AIR TRANSPORT ASSOCIATION  
OF AMERICA AS AMICUS CURIAE  
IN SUPPORT OF PETITIONERS**

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**INTEREST OF AMICUS CURIAE**

The Air Transport Association of America (ATA) was founded in 1936. It is a non-profit, unincorporated association of federally certificated air carriers that provide scheduled and charter passenger and cargo services. ATA's 17 operator members<sup>1</sup> account for more than

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<sup>1</sup> Alaska Airlines, Aloha, Airlines, American Airlines, American Trans Air, Continental Airlines, Delta Air Lines, DHL Airways, Evergreen International, Federal Express, Hawaiian Airlines, Northwest Airlines, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service, USAir. Associate members are Air Canada and Canadian Airlines International.

97% of the passenger and cargo traffic flown annually in the United States. In 1992, ATA members enplaned 441,187,000 domestic and international passengers. Domestically, ATA's members serve approximately 400 airports—virtually every commercial airport in the United States—and in 1992 had more than 12,000,000 arrival and departure operations.

ATA's principal function is to represent the interests of the U.S. commercial airline industry before the United States Congress, Federal agencies, state legislatures, and before Federal and state courts. ATA works closely with the various Federal agencies that regulate the airline industry, in particular the Department of Transportation and the Federal Aviation Administration. ATA frequently submits briefs *amicus curiae* in Federal and state court proceedings on matters of concern to the industry.

With respect to this case,<sup>2</sup> ATA is able to provide the Court with a broad perspective of the issues raised by the parties and the impact of this case on air travel as a whole. ATA, both directly and through its members, is intimately familiar with the manner in which airports operate and the mechanisms for the funding of their operations. Through its legislative activities relative to funding the Airport Improvement Program administered by the Federal Aviation Administration (FAA), and by reviewing the applications of more than 170 airports for approval to collect passenger facility charges for airport development projects, ATA has developed considerable expertise regarding airport operating costs and funding. Moreover, ATA recently began a program of financial audits of airport operations. This has enabled ATA to gain an even greater insight into airport financing and cost accounting methodologies.

The outcome of this case will have far-reaching effects on air transportation. Airport costs are among the fastest

<sup>2</sup> The parties have consented to the filing of this brief *amicus curiae*.

growing of airline operating costs. The facts below demonstrate the importance of this case to Congress' intent that the national air transportation system operate without undue burden from airport user fees.

### SUMMARY OF ARGUMENT

This brief discusses the nationwide consequences of the decision of the Sixth Circuit and the extent to which that decision subverts Congress' intent in the Anti-Head Tax Act. In that Act, Congress recognized that the Nation's airports are publicly funded and should not impose additional user fees beyond those that are reasonable and necessary to make those airports "self-sustaining." Congress clearly and certainly intended to prevent the Nation's airports from becoming profit centers for local communities.

Nevertheless, as will be shown, numerous airports now encroach on Congress' limitations and that trend is increasing as the pressure on communities to find revenue sources for local needs intensifies. As a result, fees and charges imposed by numerous airports no longer merely "sustain" airport operations, but, instead, create the very "financial windfall" that Congress intended to prevent. Undoubtedly, Grand Rapids is an extreme example of that trend.

Further confirmation that Congress intended to preclude windfalls such as those at Grand Rapids can be found in its most recent enactment in the area of airport funding. In its 1990 legislation permitting airports to assess and collect certain limited passenger facility charges, Congress made clear that any such charges would be authorized only for specific projects necessary to maintain airport services. It certainly did not authorize what has been created in this case—enormous excess funds having no clear airport purpose whatever.

If the Sixth Circuit is upheld, Congress' intent in both the Anti-Head Tax Act (AHTA) and the Airport and Air-

way Improvement Act will be completely subverted and airports nationwide will be given license to become the enormous profit centers Congress intended to avoid. The result will be a devastating burden on air commerce that those statutes were specifically designed to prevent.

### ARGUMENT

#### THE ECONOMICS OF THE NATION'S AIRPORTS DEMONSTRATE WHY THE ANTI-HEAD TAX ACT AND THE COMMERCE CLAUSE REQUIRE REVERSAL

At its essence, this case asks whether it is reasonable for airport proprietors when setting airport fees for commercial airlines to ignore what this Court already has recognized, that is, that "[v]irtually all who visit [airport] terminals do so for purposes *related to air travel*." *International Society for Krishna Consciousness v. Lee*, 60 U.S.L.W. 4749 (U.S. June 26, 1992), 550 US. —, 120 L.Ed.2d 541, 112 S.Ct. 2701 (1992) (emphasis added). Simply put, the ground-side, non-aeronautical commercial enterprises (the concessions) at airports would not exist but for the commercial airline operations.<sup>3</sup> For example, it is estimated that during the Persian Gulf War, when airline traffic fell off dramatically,

<sup>3</sup> As the Second Circuit explained, consumers of airport concession products and services would have no reason to be at an airport *but for* the commercial airline services. "The Port Authority's terminals are remote from pedestrian thoroughfares and are intended solely to facilitate a particular type of transportation—air travel—unrelated to protected expression . . . It is true that the various commercial establishments and art exhibits at the three airports create an appearance similar to a busy downtown street. It is also true, however, that the facilities in question exist solely to accommodate the needs of air travelers . . ." *International Society for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576, 581 (2d Cir. 1991) (emphasis added).

U.S. airports lost an average of \$3.1 million *per week* in concession revenues.<sup>4</sup>

Given these realities, it is unreasonable for airports not to consider the effect of concession revenues when determining airline fees and charges. The airport operator that fails to consider concession revenues virtually assures itself of excess revenues. This is so because airlines, and other airport users, are "captive" users. It is in recognition of this reality, together with the importance of assuring that interstate and foreign commerce are not impaired by parochial interests, that Congress and the courts have articulated the requirement that airport fees and charges be "reasonable," that is, that fees and charges as a whole be based on a fair approximation of costs and benefits.

Without these restrictions, airports could extract potentially unlimited tribute from the national and international air transportation system. The result, at best, is that the excess revenues sit idle, looking for a pupose. Such revenues invite misuse and misapplication. Moreover, when local governments are desperate for cash to meet budgetary demands, the inevitable result is that they seek to tap the revenues generated at their airports to pay for non-aviation related services. This, too, of course, is prohibited by the AHTA and the Commerce Clause. Nevertheless, efforts are underway to do just that.<sup>5</sup>

Under the test of reasonableness espoused by the Respondent and adopted by the Sixth Circuit, whereby a "chinese wall" is erected between air-side costs and fees on the one hand, and other airport costs and fees on the other hand, fees may be charged to airlines without regard

<sup>4</sup> American Association of Airport Executives and Airport Council International—North America (formerly Airport Operators Council International), Statement before the Committee on Public Works and Transportation, U.S. House of Representatives (March 5, 1991).

<sup>5</sup> See Los Angeles Times, June 23, 1993 at B-1 (*Riordan Makes Case for L.A. in Washington*).

to whether the airport reaps the type of financial windfall proscribed by the Anti-Head Tax Act (AHTA)<sup>6</sup> and the Commerce Clause,<sup>7</sup> or whether the airport as a whole is "self-sustaining," as required by the Airport and Airway Improvement Act of 1982 (AAIA).<sup>8</sup> The result is a legal fiction that, in the end, circumvents the requirement that airline fees and charges be reasonable, and defeats the Congressional purposes underlying the AHTA and the AAIA.<sup>9</sup>

Consequently, the very things that Congress intended to prevent instead occur. First, fees charged to airlines grow at a rate out of all proportion to the airport's real operating costs. Second, airports generate surplus revenues well beyond what is required to be "self-sustaining." The presence of these attributes—fundamentally inconsistent with the purposes underlying the AHTA—are strong indicia that airport fees and charges are unreasonable. And third, the fact that Congress did not intend to authorize such fees and charges has been recently reaffirmed in the Aviation Safety and Capacity Expansion Act of 1990, Pub. L. No. 101-508, Tit. IX, § 9110.

#### A. Airport Charges Are Out of Control

The U.S. airline industry has lost \$10 billion over the past three years. Air Transport Association of America, *Air Transport 1993: Annual Report of the U.S. Sched-*

<sup>6</sup> Pub. L. No. 93-44, § 7, 87 Stat. 90, codified as amended at 49 U.S.C. App. § 1513.

<sup>7</sup> See: *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972).

<sup>8</sup> Pub. L. No. 97-248, 96 Stat. 671, codified at 49 U.S.C. App. § 2210.

<sup>9</sup> The AHTA was intended, *inter alia*, to ensure that airports do not reap "financial windfalls" by imposing direct or indirect charges on persons and goods moving by air. S. Rep. No. 93-12, 93rd Cong., 1st Sess., reprinted in 1973 USCCAN 1434, 1446. The AAIA, by providing Federal funding of airport projects, exacts a promise from airports that the revenues they generate are used for capital and operating costs, so that airports are "as self-sustaining as possible." 49 U.S.C. § 2210(a) (9) & (12).

*uled Airline Industry (June 1993)*. As a result, operating costs have been closely scrutinized and, where possible and consistent with safety obligations, curtailed. Unlike many other cost items, however, airport costs have risen dramatically. Airport charges are among the fastest growing operating expense items incurred by airlines. In the eleven years from 1982 to 1992, airport fees and charges paid by airlines have risen virtually unimpeded—to the point where they no longer bear any rational relationship to other airline operating costs.

On a per-passenger basis, landing fees and rental costs increased 83.2% between 1982 and 1992. *Landing fees alone increased by 79% during that period*. By comparison, consumer prices have risen 46% and the producer price index has risen just 18%. Further, airline labor costs (on a per employee basis) have risen 34%, meal costs have risen 44%, advertising costs (obviously, unlike landing fees, a controllable item) have decreased by 10%, and interest rates have decreased by 15%. The cost of fuel on a per gallon basis has decreased by 36%. In the aggregate, airline operating costs other than airport-related costs have risen only 19.5% since 1992.<sup>10</sup>

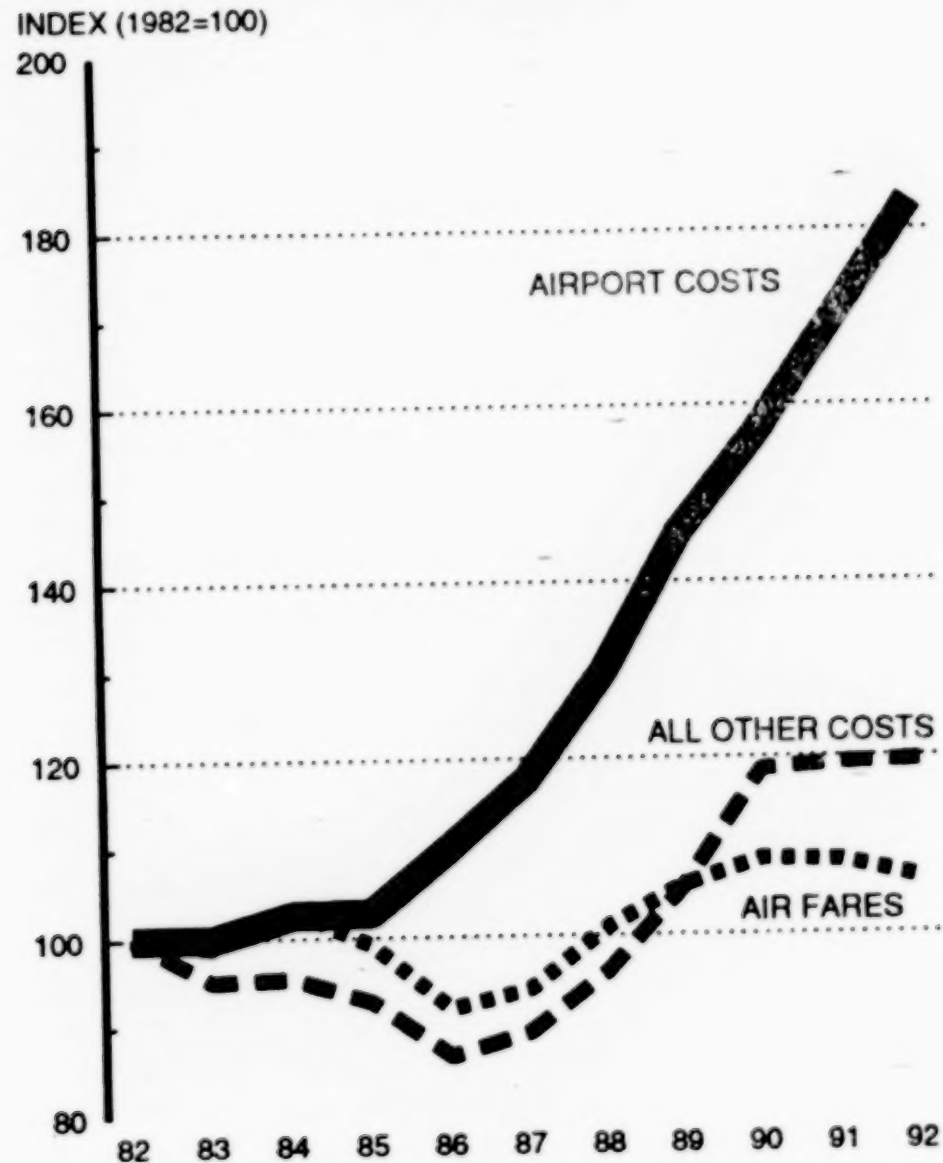
During the same 1982-1992 time period, average ticket prices have increased by only 7%.<sup>11</sup>

Thus, as can be seen from the chart below, the dramatic increase in fees and charges imposed by airports on the commercial airlines stands out in stark contrast to the other airline operating costs noted above and the moderate increase in the price of airline tickets. Airports' real operating costs do not justify these dramatic increases. The lack of real cost justification is demonstrated by extensive and growing excess airport revenues.

<sup>10</sup> Statistics maintained by Air Transport Association based on data submitted to the Department of Transportation on DOT Form 41. See Air Transport Association of America, *1993 State of the U.S. Airline Industry: A Report on Recent Trends for U.S. Air Carriers* (Feb. 1993).

<sup>11</sup> Statistics maintained by Air Transport Association of America.

# AIRPORT COSTS PER PASSENGER vs ALL OTHER COSTS and AIR FARES



## B. Excess Revenues Are Significant and Extensive

Surplus revenues in excess of operating costs are the second indication of unreasonable landing fees. The latest survey of U.S. airport rates and charges confirms that many of the nation's airports are, in fact, generating excess revenues. American Association of Airport Execu-

tives, *Survey of Airport Rates and Charges 1991-1992* (undated) (the Survey).

For example, among the nation's largest airports, excess revenues for calendar year 1991 include \$137,000,000 at John F. Kennedy International Airport, \$122,000,00 at Newark International Airport, \$66,000,000 at Las Vegas McCarran International Airport, \$58,500,000 at Boston Logan International Airport, \$52,300,000 at Houston International Airport, \$45,000,000 at La Guardia Airport, and \$43,500,000 at Seattle Tacoma International Airport. The nation's twenty largest airports reporting in the Survey averaged more than \$36,500,000 each in excess operating revenues in 1991.

Excess revenues are not limited, however, to the nation's largest airports. Medium and small hub airports also generate significant excess revenues. Twenty-seven medium hub airports, of which Respondent is one, generated \$266 million in excess revenues in 1991, or nearly \$10,000,000 per airport. Forty-six small hub airports generated approximately \$47,000,000 in excess revenues in 1991.

These kinds of surplus revenues, or profits, are exactly the "financial windfalls" Congress intended to prevent. S. Rep. No. 93-12, 93rd Cong., 1st Sess., *reprinted in* 1973 USCCAN 1434, 1446. Congress' reasoning is unavailable. Funding local airport profits necessarily increases airline operating costs which, in turn, cause higher ticket prices to be paid by passengers. *Id.* at 1451.

The impact on the airlines of funding airport excess revenues cannot be understated. Reducing airline costs by just two percentage points would affect hundreds of millions of dollars in revenue. For example, if the Federal ticket tax were reduced by two percent, from 10% to 8%, it is estimated that 6.5 million *additional* passengers would fly annually, airline industry revenues would increase by \$900 million and net profit by \$300 million.

Airport profits, like the ticket tax, sap the ability of the airlines to achieve these results.

If the decision below is upheld, airports across the country will continue to earn more and more excess revenues and will become even more aggressive in exacting still higher payments. The inevitable consequence is that costs of air transportation will likewise grow unabated. This trend will further burden a U.S. airline industry that already has seen seven large airlines slip into bankruptcy.<sup>12</sup> Such a result would necessarily and unduly burden air commerce—the precise result the AHTA was intended to prevent.

**C. The Reasonableness of Airport Fees and Charges Must Be Considered in Context With Passenger Facility Charges**

In 1990, Congress authorized airports to impose a fee on passengers for the purpose of funding future airport development projects for which funding was otherwise unavailable (Passenger Facility Charge or PFC).<sup>13</sup> This amendment to the Federal Aviation Act permits most U.S. airports with regularly scheduled service to charge enplaning passengers a PFC of \$1.00, \$2.00 or \$3.00. This funding is in addition to funding under the FAA's Airport Improvement Program ("AIP").<sup>14</sup>

<sup>12</sup> Eastern Air Lines, Continental Airlines, Pan American World Airways, Trans World Airlines, America West Airlines, Braniff Airlines, and petitioner Midway Airlines. Today, only three of these airlines continue to operate.

<sup>13</sup> Aviation Safety and Capacity Expansion Act of 1990, Pub. L. No. 101-508, Tit. IX, § 9110.

<sup>14</sup> The AIP program, established by the Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, 96 Stat. 671, replaced the previous funding program created in 1970 by the Airport and Airway Development Act, Pub. L. No. 91-258, 84 Stat. 219. The AIP program is funded by a 10% federal tax on domestic airline tickets. Since 1982, nearly \$13 billion in AIP funds have been spent on airport improvement projects. *Airport Improvement Program: Opportunity to Consider FAA's Role in Meeting Airport System Needs*, Statement of Kenneth Mead, Director of Transportation

The PFC enabling legislation makes clear that Congress did not abandon its long history of fiscal concern and constraint on airports to ensure that they not reap windfalls when determining rates and fees charged to airlines. The statute states, in pertinent part:

**"(7) AIR CARRIER RATES, FEES, AND CHARGES.**

**"(B) CAPITAL COSTS.**—Except as provided by subparagraph (C), a public agency which controls a commercial service airport shall not include in its rate base by means of depreciation, amortization, or any other method that portion of the capital costs of a project paid for using revenues derived from fees collected pursuant to this subsection for the purpose of establishing a rate, fee, or charge pursuant to a contract between such agency and an air carrier."

49 U.S.C. App. § 1513(e)(7)(B).

FAA is given the responsibility for determining whether proposed development projects satisfy the eligibility criteria set out in the statute. 49 U.S.C. App. § 1513(e)(2). In essence, PFC eligibility is limited to projects that are eligible for AIP funding, as well as certain noise abatement/compatibility measures. 49 U.S.C. App. § 1513(e)(15)(C).

As of July 1993, FAA had approved PFC-financed projects at 119 airports totalling \$7.2 billion, and had 62 applications pending for an additional \$3.8 billion. Respondent is among the 119 airports that have obtained approval for PFC funded airport development projects.

Indeed, in this particular case, respondent is authorized to impose, and has begun collecting, a \$3.00 PFC from all enplaning passengers for the construction of a parallel

Issues, U.S. General Accounting Office, before the Subcommittee on Aviation, Committee on Public Works and Transportation, House of Representatives (May 26, 1993) GAO/T-RCED-93-43. Congress appropriated \$1.8 billion for AIP funding. In FY 1992, Congress appropriated \$1.9 billion for AIP funding.

runway and related facilities. Federal Aviation Administration, Record of Decision, Kent County Department of Aeronautics, Grand Rapids, Michigan (September 9, 1992), at 2. Respondent is permitted to collect \$12,500,000. The balance of the cost of this project \$33,585,600, is to be funded by "AIP discretionary funds and funds from other sources." *Id.* This project appears to duplicate exactly a project relied upon by Respondent at trial to justify collecting excess revenues. See Defendant's Exhibit DA 23, APP-001479, lines 26-29. Given the fact that Respondent is collecting a PFC to fund a project which purportedly justified its rates and charges, those rates and charges necessarily are unreasonable.

Against this backdrop, excess airport revenues are uniformly unreasonable. By authorizing a new program to fund needed airport development projects for which funding was otherwise lacking, Congress underscored its intent in the Anti-Head Tax Act that all airport revenues are to be protected. The PFC enabling legislation filled a perceived need for additional airport capital development financing. To suggest that at the same time excess charges could be imposed is illogical and any such charges are necessarily unreasonable within the meaning of the AHTA.

#### CONCLUSION

The judgment below should be reversed and the case remanded for consideration of petitioners' damages.

Respectfully submitted,

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